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**TITLE 327 WATER POLLUTION CONTROL BOARD****SECOND NOTICE OF COMMENT PERIOD**

LSA Document #09-213

**DEVELOPMENT OF NEW RULES AT [327 IAC 15-16](#) CONCERNING CONCENTRATED ANIMAL FEEDING OPERATIONS****PURPOSE OF NOTICE**

The Indiana Department of Environmental Management (IDEM) has developed draft rule language for a new rule at [327 IAC 15-16](#) concerning concentrated animal feeding operations (CAFO). By this notice, IDEM is soliciting public comment on the draft rule language. IDEM seeks comment on the affected citations listed and any other provisions of Title 327 that may be affected by this rulemaking.

**HISTORY**

First Notice of Comment Period: April 8, 2009, Indiana Register ([20090408-IR-327090213FNA](#)).

**CITATIONS AFFECTED:** [327 IAC 5-4-3](#); [327 IAC 5-4-3.1](#); [327 IAC 15-15](#); [327 IAC 16](#).

**AUTHORITY:** [IC 13-14-8](#); [IC 13-18-10](#); [IC 13-18-20](#).

**SUBJECT MATTER AND BASIC PURPOSE OF RULEMAKING****Basic Purpose and Background**

The EPA began regulating discharges of wastewater and manure from CAFOs in the 1970s. The EPA initially issued national effluent limitations guidelines and standards for feedlots on February 14, 1974 (39 FR 5704), and National Pollutant Discharge Elimination System (NPDES) CAFO regulations on March 18, 1976 (41 FR 11,458). In February 2003, EPA issued revisions to these regulations that focused on the 5% of the nation's animal feeding operations (AFOs) that presented the highest risk of impairing water quality and public health (68 FR 7176–7274; February 12, 2003) (the 2003 CAFO rule). The 2003 CAFO rule required the owners or operators of all CAFOs to seek coverage under an NPDES permit, unless they demonstrated no potential to discharge.

A number of CAFO industry and several environmental groups filed petitions for judicial review of certain aspects of the 2003 CAFO rule. This case was brought before the U.S. Court of Appeals for the Second Circuit. On February 28, 2005, the court ruled on these petitions and upheld most provisions of the 2003 rule but vacated and remanded others. *Waterkeeper Alliance, et al. v. EPA*, 399 F.3d 486 (2d Cir. 2005).

The CAFO industry organizations argued that EPA exceeded its statutory authority by requiring all CAFOs to either apply for NPDES permits or demonstrate that they have no potential to discharge. The court agreed with the CAFO industry petitioners on this issue and therefore vacated the "duty to apply" provision of the 2003 CAFO rule and ordered EPA to revise the "duty to apply" to include only CAFOs that discharge or propose to discharge. The court also made several other rulings relative to nutrient management plans. On November 20, 2008, EPA published rules to integrate all of the changes ordered by the court. IDEM is now proposing to incorporate the new federal rules by reference in a new rule at [327 IAC 15-16](#) that would replace existing rules that IDEM proposed to amend in the first notice of this rulemaking, published on April 8, 2009.

Due to the impact of deadlines in IDEM's rules on operations that would no longer have to comply with those deadlines under the revisions to the "duty to apply", IDEM is publishing a set of emergency rules in the Indiana Register that incorporates the revisions to the "duty to apply" ordered by the court. The current emergency rule can be found at the Indiana Register's website at DIN: [20100519-IR-327100334ERA](#).

This rulemaking is being done in conjunction with LSA Document #09-615. LSA Document #09-615 is updating the state confined feeding operations rule to encompass those CAFO farms that determine that they will not discharge or propose to discharge under the federal NPDES regulations. Additionally, all CAFOs are CFOs under Indiana law and must comply with the design and construction requirements under [IC 13-18-10](#). These requirements are also being updated in the CFO rulemaking. IDEM is currently planning to have the same effective date for these two rules in order to ensure administrative consistency and, if applicable, a smooth transition from the NPDES permit program to a CFO approval. Once these two rules are effective, the emergency rule will be allowed to expire.

IDEM is also proposing to eliminate the currently existing CAFO NPDES permit rule at [327 IAC 5-4-3](#) and the "no potential to discharge" rule at [327 IAC 5-4-3.1](#) as well as the NPDES general permit at [327 IAC 15-15](#). The CAFO NPDES general permit was originally developed in an effort to issue a large number of NPDES permits in a relatively short time frame in response to a court order. Now that the NPDES program is well established, IDEM believes that individual NPDES permits for CAFOs within Indiana can better address the site-specific conditions and practices at each facility than the general permit.

[IC 13-14-9-4](#) **Identification of Restrictions and Requirements Not Imposed under Federal Law**

No element of the draft rule imposes either a restriction or a requirement on persons to whom the draft rule applies that is not imposed under federal law or current state law.

#### **Potential Fiscal Impact**

The proposed rule incorporates federal rules by reference or implements current state law and adds rules on design and construction requirements for CAFOs. Any CAFO owner or operator who chooses to self-certify that they do not propose to discharge will then be regulated as a CFO in the state of Indiana. Moving from the NPDES permit program to a CFO approval will provide a cost savings in two areas:

- (1) A Soil Conservation Practice Plan (SCPP) will no longer be required.
- (2) Annual reports will no longer be required.

Producers will no longer have to spend man-hours preparing these reports, resulting in a cost savings.

Farms that choose to retain an NPDES permit will be subject to federal regulations and all expenses therein. The final 2008 NPDES CAFO rule is available at:

[http://www.epa.gov/npdes/regulations/cafo\\_final\\_rule\\_preamble2008.pdf](http://www.epa.gov/npdes/regulations/cafo_final_rule_preamble2008.pdf)

#### **Public Participation and Workgroup Information**

Currently no workgroup is planned for this rulemaking. If you feel that a workgroup or other informal discussion on the rule is appropriate, please contact Lydia Kuykendal, Rules Development Branch, Office of Legal Counsel, (317) 234-5345, or (800) 451-6027 (in Indiana).

#### **SUMMARY/RESPONSE TO COMMENTS FROM THE FIRST COMMENT PERIOD**

IDEM requested public comment from April 8, 2009, through May 8, 2009, on alternative ways to achieve the purpose of the rule and suggestions for the development of draft rule language IDEM received comments from the following parties by the comment period deadline:

Kathryn Petry (KP)  
Robin Mills Ridgway, representing Purdue University (RMR)  
Dewey Bryant (DB)  
Gena Hartman (GH)  
Hoosier Environmental Council (HEC)  
Conservation Law Center (CLC)  
The Sierra Club (SC)  
Michelle Bryant (MB)  
Livestock and Poultry Rule Revision Group (LPRRG)

*Comment:* IDEM needs to incorporate all changes addressed in the 2008 EPA CAFO rules. (KP), (GH), (DB), (MB), (RMR), (SC), (HEC), (CLC), (LPRRG)

*Response:* IDEM agrees with this comment and will incorporate by reference the 2008 EPA CAFO rules.

*Comment:* Nutrient management plans (NMPs) need to be included as well. (KP), (GH), (DB), (MB), (SC), (HEC), (CLC)

*Response:* All farms subject to the NPDES CAFO rules will have to comply with all requirements therein, including the development of NMPs.

#### **REQUEST FOR PUBLIC COMMENTS**

This notice requests the submission of comments on the draft rule language, including suggestions for specific revisions to language to be contained in the draft rule. Mailed comments should be addressed to:

#09-213(WPCB) (CAFO Rulemaking)  
Janet Pittman  
Rules Development Branch  
Office of Legal Counsel  
Indiana Department of Environmental Management  
100 North Senate Avenue MC 65-46  
Indianapolis, Indiana 46204-2251

Hand delivered comments will be accepted by the receptionist on duty at the thirteenth floor reception desk, Office of Legal Counsel, 100 North Senate Avenue, Indianapolis, Indiana.

Comments may be submitted by facsimile at the IDEM fax number: (317) 233-5970, Monday through Friday, between 8:15 a.m. and 4:45 p.m. Please confirm the timely receipt of faxed comments by calling the Rules Development Branch at (317) 232-8922.

#### **COMMENT PERIOD DEADLINE**

Comments must be postmarked, faxed, or hand delivered by September 24, 2010.

Additional information regarding this action may be obtained from Lydia Kuykendal, Rules Development Branch, Office of Legal Counsel, (317) 234-5345, or (800) 451-6027 (in Indiana).

#### **DRAFT RULE**

SECTION 1. [327 IAC 15-16](#) IS ADDED TO READ AS FOLLOWS:

**Rule 16. Concentrated Animal Feeding Operations (CAFOs)**

**[327 IAC 15-16-1](#) Purpose**

Authority: [IC 13-14-8-1](#); [IC 13-18-10-4](#)

Affected: [IC 13-11-2](#); [IC 13-14-12](#); [IC 13-18](#); [IC 13-30](#)

Sec. 1. This rule:

- (1) incorporates by reference federal NPDES concentrated animal feeding operation (CAFO) regulations;
- (2) requires construction standards for CAFOs; and
- (3) details how to be removed from the CAFO permitting program.

(Water Pollution Control Board; [327 IAC 15-16-1](#))

**[327 IAC 15-16-2](#) Incorporation by reference**

Authority: [IC 13-14-8-1](#); [IC 13-18-10-4](#)

Affected: [IC 13-11-2](#); [IC 13-14-12](#); [IC 13-18](#); [IC 13-30](#)

Sec. 2. (a) The following are incorporated by reference, revised as of July 1, 2009:

- (1) 40 CFR 122.23.
- (2) 40 CFR 412.

(b) Federal regulations that have been incorporated by reference do not include any later amendments than those specified in the incorporation citation in subsection (a). Sales of the Code of Federal Regulations are handled by the Government Printing Office, P.O. Box 979050, St. Louis, MO 63197-9000, or online at <http://bookstore.gpo.gov/>. The incorporated materials are available for public review at the offices of the department of environmental management.

(Water Pollution Control Board; [327 IAC 15-16-2](#))

**[327 IAC 15-16-3](#) Conversion of federal terms**

Authority: [IC 13-14-8-1](#); [IC 13-18-10-4](#)

Affected: [IC 13-11-2](#); [IC 13-14-12](#); [IC 13-18](#); [IC 13-30](#)

Sec. 3. When used in 40 CFR, as adopted in this rule, substitute the following unless otherwise indicated:

- (1) "Administrator" means the commissioner of the Indiana department of environmental management.
- (2) "Agency" means the Indiana department of environmental management.
- (3) "Director" means the commissioner of the Indiana department of environmental management.
- (4) "Environmental protection agency" or "EPA" means the Indiana department of environmental management.
- (5) "State", "authorized state", "approved state", and "approved program" means Indiana.
- (6) "United States" means the state of Indiana.

(Water Pollution Control Board; [327 IAC 15-16-3](#))

**[327 IAC 15-16-4](#) Other applicable permits**

Authority: [IC 13-14-8-1](#); [IC 13-18-10-4](#)

Affected: [IC 13-11-2](#); [IC 13-14-12](#); [IC 13-18](#); [IC 13-30](#)

**Sec. 4. (a)** The owner or operator of a CAFO seeking permit coverage under 40 CFR 122.23 must do the following:

- (1) Submit proof that all permits necessary to operate as a CAFO in Indiana have been acquired, to the Indiana Department of Environmental Management, Office of Land Quality, 100 North Senate Avenue, Room N1154, Indianapolis, IN 46204, Attention: Permits Section.
- (2) Submit an application in accordance with [327 IAC 19-7-1](#) to apply for approval to construct or expand a confined feeding operation on land for which a valid existing approval has not been issued.
- (3) Obtain a separate construction approval when expanding the CAFO to increase animal capacity or manure containment capacity. This requirement can be met by submitting an application in accordance with [327 IAC 19-7-1](#). The department shall incorporate the approval into the CAFO NPDES permit.

**(b)** A CFO with a valid existing approval under [327 IAC 19-7-1](#) seeking permit coverage under 40 CFR 122.23 is not required to renew that CFO approval.

*(Water Pollution Control Board; [327 IAC 15-16-4](#))*

#### **[327 IAC 15-16-5](#) Design and construction requirements**

**Authority:** [IC 13-14-8-1](#); [IC 13-18-10-4](#)

**Affected:** [IC 13-11-2](#); [IC 13-14-12](#); [IC 13-18](#); [IC 13-30](#)

**Sec. 5.** All permitted CAFOs must comply with the design and construction requirements of [327 IAC 19-12](#), unless an alternative design or compliance approach has been approved by the commissioner under [327 IAC 19-5-1](#).

*(Water Pollution Control Board; [327 IAC 15-16-5](#))*

#### **[327 IAC 15-16-6](#) Removal from the CAFO program and transferring a CAFO permit**

**Authority:** [IC 13-14-8-1](#); [IC 13-18-10-4](#)

**Affected:** [IC 13-11-2-40](#); [IC 13-14-12](#); [IC 13-18](#); [IC 13-30](#)

**Sec. 6. (a)** An owner or operator of a permitted CAFO may exit the permit program if the department has received:

- (1) a self-certification that the facility does not discharge or propose to discharge; or
- (2) notification on forms provided by the department that the CAFO no longer has a duty to maintain an NPDES permit.

**(b)** If a facility being removed from the NPDES permit program will meet the definition of a confined feeding operation (CFO) under [IC 13-11-2-40](#), the owner or operator must submit a new approval application under [327 IAC 19-7-1](#). Coverage under the CFO program commences when the department issues the CFO approval and remains in effect for five (5) years.

**(c)** A CAFO that is ceasing operation and closing completely must do so in accordance with [327 IAC 19-16-3](#).

**(d)** Transfer of ownership of a CAFO must be done in accordance with [327 IAC 5-2-6\(c\)](#).

*(Water Pollution Control Board; [327 IAC 15-16-6](#))*

**SECTION 2. THE FOLLOWING ARE REPEALED:** [327 IAC 5-4-3](#); [327 IAC 5-4-3.1](#); [327 IAC 15-15](#).

#### **[Notice of Public Hearing](#)**

*Posted: 08/11/2010 by Legislative Services Agency*  
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